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Article

# Not Worth the Net Worth? The Democratic Dilemmas of Privileged Access to Information

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## Abstract

In this article, we discuss the democratic conditions for parliamentary oversight in EU foreign affairs. Our point of departure is two Interinstitutional Agreements (IIAs) between the Council and the European Parliament (EP), which provide the latter with access to sensitive documents. To shed light on this issue, we ask to what extent these contribute to the democratic accountability in EU foreign policy? It is argued that the IIAs have strengthened the EP's role in EU foreign affairs by giving it access to information to which it was previously denied. This does not mean, however, that this increase in power equals a strengthening of the EP as a democratic accountability forum. First of all, both IIAs (even if there are differences between them) fail to maximise the likelihood that the plurality of views in the EP as a whole is reproduced. Secondly, and more importantly, the EU citizens are largely deprived of opportunities to appraise how their elected representatives have exercised their role as guardians of executive power.

## Keywords

democratic accountability; European Parliament; European Union; secrecy; transparency

## Issue

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## 1. Introduction

When it comes to foreign policy, most parliaments play a very different role compared to other areas of public policy. Historically, foreign policy was a royal prerogative, and it still is largely in the hands of the executive branch. So too in the European Union (EU), where national governments tend to dominate the making of foreign policy, particularly in the area of the Common Foreign and Security Policy (CFSP). Avoiding constraints of democratic procedures is one reason for moving foreign policy decisions to the EU-level (Koenig-Archibugi, 2004). Foreign policy is rarely enacted through legislation, which contributes to reducing parliamentary involvement, and in the EU, the treaty explicitly excludes legislation from the

CFSP (Article 24, Treaty on European Union [TEU]). Access to information is another major obstacle for parliaments in this field. Because executives own most of the information—whether about operational plans or international negotiations—it creates an informational asymmetry that disadvantages parliaments. In the words of Raunio and Wagner (2017, p. 9), in the area of foreign policy, “much of parliamentary activity focuses on getting timely and accurate information”. Without appropriate information it is difficult for parliamentarians to hold the executive to account, particularly regarding activities within international organizations.

At the EU-level, the European Parliament (EP) is better placed than national parliaments to monitor and oversee the Union's foreign policy activities because it

is in regular contact with the EU-executives.<sup>1</sup> According to Article 36, TEU, the EP shall be consulted on the main aspects and basic choices of the CFSP, and is entitled to be informed about how those policies evolve. After the entry into force of the Lisbon Treaty, the EP has to give consent to international agreements, and as a corollary, is to be informed at all stages of the decision-making procedure (Article 218(10)) (see Abazi & Adriaensen, 2017, in this issue).<sup>2</sup> Neither article is explicit about the scope or depth of the EP's right to information. Therefore, the EP has made an effort to impose its own interpretation of the Parliament's right to information, mostly against considerable opposition from member states, but often with at least some success (Rosén, 2015, 2017). In this article, we assess two key agreements that have given the EP access to documents in external relations, and ask: *to what extent do these contribute to the democratic accountability of EU foreign policy?*

As one of the main indicators of democratic quality, accountability signifies the extent to which EU institutions "can be—and are—held to account by democratic forums" (Bovens, Curtin, & t'Hart, 2010, p. 5). Parliaments are popularly elected and well suited to perform this task, but parliamentary involvement should not automatically be equated with democracy. One also has to assess the quality of the arrangement for access to information in order to judge if these really enhance the preconditions for democracy (cf. Stie, 2013). Based on a deliberative reading of democracy, we have discerned three dimensions of accountability relations to evaluate the agreements and the practices they give rise to: First, the interinstitutional relations between the EP and the executive, secondly the intrainstitutional relations within the EP itself, and thirdly, the relationship between the EP and the EU citizens. More specifically, we look at two Interinstitutional Agreements (IIAs) that the EP and the Council have concluded on access to documents. In 2002, they agreed an IIA concerning access by the EP to sensitive information of the Council in the field of security and defence policy.<sup>3</sup> This agreement established an arrangement whereby five Members of the EP (MEPs) can peruse documents that the Council finds necessary to withhold from the public. A decade later, subsequent to the changes in the Lisbon Treaty, another IIA was concluded, this time on access to classified documents held by the Council on matters except CFSP.<sup>4</sup> Through this agreement information is available to a broader range of MEPs, albeit limited to members of the relevant committee as well as other specialised EP bodies.<sup>5</sup>

As shown below, these agreements raise difficult dilemmas when viewed as potential vehicles for democratisation of EU foreign policy. These pertain mainly to the internal relationship between those MEPs who get, and those who do not get, access to confidential information and to the relationship between the EP and Union citizens. We argue that how these relationships are organised and practiced affect the normative authority by which the EP can claim to speak on behalf of its electorate. Given that there are a series of strings attached to accessing these documents, what is the democratic net-worth of such IIAs to the EP?

## 2. Assessing the Democratic Credentials of the Interinstitutional Agreements: An Analytical Framework

Secrecy in foreign policy is often claimed to be required to protect national security and interests of the state (Hill, 2003). However, the inherent threat of secrecy is that it "obstructs the standard mechanisms for oversight utilized by representative democracies—elections, public opinion and deliberation" (Curtin, 2014, p. 4). In a democracy, access to information is a "precondition for the establishment and maintenance of realistic accountability mechanisms" (Stie, 2013, p. 44). Although one could argue that there are legitimate reasons to keep secrets in foreign policy, if parliaments are to hold the executive to account, they need access to information, including sensitive documents. How, then, can we go about assessing whether the IIAs strengthen the accountability mechanisms in EU foreign policy?

Bovens et al. (2010, p. 35) define accountability as a social "relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences". Because we want to analyse whether the IIAs have strengthened the EP as a *democratic* accountability forum, we apply a *democratic* reading of this definition, where accountability requires popular control with decision-making, and can only be met if "an arrangement or regime enables democratically legitimized bodies to monitor and evaluate executive behaviour and to induce executive actors to modify that behaviour in accordance with their preferences" (Bovens et al., 2010, p. 54). From this definition, we derive the normative benchmarks and dimensions applied in the analysis.

In this article, we have developed an analytical framework anchored in the tradition of deliberative democ-

<sup>1</sup> Who the main executive is depends on the policy area. For the CFSP it is mainly the Council and the European External Action Service, while for other areas of external relations, the Commission is a key executive actor together with the Council. We do not include national parliaments in the current analysis because they mainly have the possibility to control their respective national governments. Being situated at the EU-level, the EP can hold the Council as a whole to account.

<sup>2</sup> CFSP-agreements do not require consent, but the EP is to be kept informed throughout negotiations.

<sup>3</sup> OJ 2002/C298/01.

<sup>4</sup> OJ 2014/C095/01.

<sup>5</sup> We have chosen to focus on the agreements between the Council and the EP. This does not mean that we disregard the executive roles of the Commission or the European External Action Service (EEAS). However, the Council still holds a firm grip on policy-making in EU foreign affairs, especially security and defence policy, and is therefore an important, but also difficult agent, for the EP to hold to account.

racy. Here democracy is understood as “a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future” (Gutmann & Thompson, 2004, p. 7; see also Forst, 2001). Bovens et al.’s definition of accountability sits well with a deliberative approach as they are both structured around a practice of justification. However, in the democratic reading, the challenge is how to institutionalise decision-making procedures that are sufficiently open and accessible to the *viewpoints* of affected parties so that those in government do not become too independent and insulated from input and scrutiny of the electorate. In representative systems, parliaments play an important role in establishing such a link between decision-makers and citizens in the public sphere<sup>6</sup> because they are founded on the logic of contestation and discussion among directly elected politicians who represent a plethora of citizens’ viewpoints. Even if parliaments fail to perfectly reproduce the pluralism of viewpoints that exist in society, they nevertheless represent the best institutional approximation of how citizens can see themselves as authors of the law without directly participating in decision-making themselves. Hence, when assessing the democratic accountability potential of the IIAs, the normative benchmark of deliberative democracy requires that they improve the EP’s possibilities to facilitate arenas where the EU’s foreign policy can be critically scrutinised against the plurality of societal viewpoints. What kind of accountability relationships this would require in more concrete terms can be structured along three dimensions.

*Firstly*, it compels a democratically elected body outside the executive capable of scrutinizing and controlling its powers. Hence, a crucial feature of parliaments in their function as accountability forums is their ability to exercise oversight independently of the agent. This is difficult as there is an inbuilt information asymmetry pertaining to the fact that the executive is the “owner” of secret information, not only because it initiates policies, but also because it obtains information through intelligence services and/or diplomatic channels.<sup>7</sup> The basis for being able to exercise control, is what Lester (2015, p. 16) has identified as an issue of *autonomy*. This requires that the accountability mechanisms “have an independent and autonomous role from the overseen; that they have a separate statutory basis for their operations, and, thus, that their activities and decisions cannot be influenced by pressure from the overseen”. Crucially, this entails the possibility that parliament can interrogate or pass judgement on the executive, i.e. that holding to account has consequences or some form of sanctioning power (cf. Bovens et al., 2010). For the EP, the ques-

tion is whether it possesses some form of parliamentary censure or veto that it can impose on the executive (or threaten with), if it strongly disagrees with the activities executed. Or it can mean the possibility of judicial review, i.e. the opportunity to appeal to the Court of Justice of the European Union. Sanctions also encompass less formal consequences—such as naming and shaming through parliamentary questions that may have reputational costs (Bovens et al., 2010).

*Secondly*, the parliament draws its authority from the fact that it is popularly elected and thus composed according to a *representative selection of viewpoints* among the electorate. To respect and reproduce this representativity during the account-holding process is vital in order to maximise the likelihood that all relevant viewpoints are included. In addition, it minimises speculations about the forum’s discussions being dominated by private and strategic considerations rather than being an arena where foreign policy is scrutinised and considered for its conduciveness to the public good (Chambers, 2004). To be able to pose meaningful questions, probe intelligently into the executive’s activities and pass judgement on behalf of the citizens, parliamentarians must have access to relevant documents. However, in many other countries, not all members of parliament have access to confidential documents, and this is also the case in the EU. In cases where the accountability forum meets behind closed doors (Abazi, 2016), there is always the risk that discussions become biased or narrow (cf. Chambers, 2004). In these situations it is vital that the account-holding situation is still subject to a critical and balanced treatment from across the political spectrum of viewpoints represented in the EP plenary. Hence, for a subset of MEPs to legitimately claim to act on behalf of the EP as a whole, it will, at a minimum, have to somehow reflect the overall composition of the chamber.

*Thirdly*, that parliament or a subset of parliamentarians knows state secrets have little *democratic* value if that information is not somehow shared with the public. How else can parliamentarians claim to be speaking on behalf of Union citizens? Consequently, although some MEPs have privileged access to information, at some point, they must demonstrate to their voters how they have made use of that information to keep the executives in check. This would mean that the EP provides the public with information on the reasoning behind decisions (cf. Mansbridge, 2009). One could for instance imagine that the EP has a plenary debate about the CFSP where MEPs lay out the reasons for supporting/ not supporting the EU’s activities. Based on these justifications, members of the public can then assess whether they think MEPs have done a satisfactory job keeping score on the executive. In the case of particularly important—or particularly contested—decisions, it may not suffice that MEPs receive information in secluded fora. In some

<sup>6</sup> Or between strong and weak publics as Nancy Fraser (1992) has termed it.

<sup>7</sup> The principle of originator control is a further disadvantage to the EP because third parties, including member states, can decide not to disclose documents they have provided to the EU (Curtin, 2013).

situations it may be necessary that the public is aware of the positions and arguments of the different parties involved in the decision-making process in order to be able to reach an informed opinion.

Nevertheless, exceptions to the standard of transparency can only be dealt with through special rules which narrowly delineate how and when secrecy is justified. As these rules allow for secrecy, it is crucial that they themselves have been vetted in a publicly accessible decision-making process prior to their application. In the words of Thompson (1999, p. 185): “Secrecy is justifiable only if it is actually justified in a process that itself is not secret”. In the case of the IIAs, this means that the rules for secrecy have been discussed in parliamentary fora open to the public. Furthermore, rules and procedures of secrecy—such as classification rules—should be transparent (Curtin, 2013).

The three dimensions highlight inter-connected features of the accountability relationship (1) between government branches; (2) between subsets of MEPs and the EP as a whole; and finally (3) between the EP and Union citizens, which together put us in a position to discuss if the EP’s role as a democratic account-holder in foreign policy have been strengthened through the IIAs.<sup>8</sup> In our analysis, we assess both the formal arrangements, i.e. the text of the IIAs, and the practice resulting from them. The data material consists of official documents (EP-reports, parliamentary debates, minutes from the Conference of Presidents in charge of the negotiations of the IIA, as well as Council working documents and drafts). In addition, 34 interviews with politicians and officials from the EP, the EEAS, the Commission, and the Council have been conducted.<sup>9</sup>

### 3. The Interinstitutional Agreements (IIAs)

Most IIAs are designed to facilitate cooperation between the EU institutions, but always within the boundaries of primary and secondary law (Eiselt & Slominski, 2006). Nevertheless, the substantive impact of such agreements can be significant, and they are often sought after by the EP in an attempt to carve out a greater role for itself. With the development of EU’s security and defence policy at the end of the 1990s and as a result of the intention to exchange information with NATO, the EU was put under pressure to reform its security regulations (Reichard, 2006). The issue of how to protect sensitive EU documents created two fractions with the EP and member states who favoured a more open approach on one side, and “states with a strong security interest” on the other (Bjurulf & Elgström, 2004, p. 254). After two years of negotiation, the IIA on access to sensitive information in the field of security and defence policy was agreed

(Rosén, 2015). It established an arrangement where a special committee of five MEPs gains access to sensitive documents, i.e. documents classified as Top Secret, Secret or Confidential. Documents can be requested by the AFET-chairman or the EP-president, and must be consulted in camera. The members of the committee must have security clearance and are not allowed to record or share information. While some attempts have been made to replace the 2002-IIA, the talks have been at a standstill for several years, and the agreement is therefore still in use.

While the Lisbon Treaty did not entail any significant changes for the EP’s role in the area of CSFP, it had massive implications for the EP’s role in deciding on EU international agreements (Ripoll Servent, 2014). The EP gained consent powers over “virtually any international agreement...of any significance” (Corbett, 2012, p. 249), and shall be fully informed at all stages of the negotiations (Article 218(10), TFEU). After the Treaty entered into force, however, the EP faced considerable opposition from the Council in implementing the new provisions. One of the main contested issues was the protection of classified information. Not until the EP had refused consent to two international agreements, with reference to the lack of information they had received, was a new IIA agreed in 2012. The agreement was not implemented until 2014, awaiting the process of making the EP’s security rules equivalent to those of the Council (EP#12). The new IIA established an arrangement where information is made available to a broader range of MEPs, limited to members of the relevant committee as well as other specialised EP bodies. Compared to the 2002-IIA on security and defence, the new arrangement is held—at least by some—to be more open in that more MEPs gain access to information, instead of only a small, preselected group (EP#6, EP#11).

### 4. Assessment: Have the IIAs Strengthened the EP as a Democratic Accountability Forum?

#### 4.1. Inter-Institutional Relationship between Government Branches

The first dimension concerns the relationship between government branches and addresses the extent to which the IIAs have strengthened the EP’s autonomy and its ability to control and check executive power. The 2002-IIA applies to the area of security and defence policy where supranational institutions, including the EP, have few formal rights and where Council decision-making processes largely take place behind closed doors. Taking this as a starting point, it could be argued that the 2002-IIA provides insight into parts of the EU’s security and

<sup>8</sup> It should be noted that the IIAs do not in themselves establish complete accountability arrangements because they mainly deal with transparency and do not involve a process of scrutiny as such. Hence, transparency should not be treated as coextensive with accountability (Bovens et al., 2010, p. 35), but rather as a necessary (even if not sufficient) prerequisite for holding an actor to account (cf. Hood, 2010).

<sup>9</sup> 16 interviewees were from the EP (5 MEPs and 11 staff), 5 Commission staff, 4 from the Council secretariat, 6 from national delegations and 3 from the EEAS. Interviews have been conducted between 2010–2017, in Brussels and over the telephone. All interviewees work with external relations, and several have been involved with, or have closely observed, the negotiations of the two IIAs and/or the ensuing practice of the agreements.



defence policy that would otherwise have remained secret to the EP. According to one interviewee, prior to the adoption of the 2002-IIA there was no other opportunity to engage with the Council on classified issues (EP#6). Others have described the agreement as “a substantial step forward compared to treaty provisions on informing the EP in terms of timing, scope and quality of information” (Mittag, 2006, p. 15).

This point notwithstanding, a key criticism against the 2002-IIA was that the Council might still decide to withhold documents from the EP (EP#4). According to article 2(2) of the IIA, the EP shall be informed about the content of any sensitive information “required for the exercise of the powers conferred on the European Parliament by the Treaty on European Union...taking into account the public interest”. Documents are disclosed at the request of the EP, and in order to know which documents to ask for, a list that is also classified has to be consulted (EP#6, EP#12). This makes it difficult to get a complete overview of all the existing sensitive documents, and when one does not know of a document, one cannot ask for it (EP#11). The 2002-IIA also says nothing about how and who will judge which documents are necessary in cases of conflict. While there are no direct consequences if the Council decides not to respect the IIA, the Council has to pick its battles, and behind the Council’s decision to grant access to sensitive documents was the ambition to preserve a good working relationship with the EP (NAT#1). Because the Council has not yet refused access to the EP, the arrangement has not been put to the test, but the fact that documents are in the Council’s possession weakens the EP’s autonomy (Reichard, 2006).

Another aspect concerns the extent to which the 2002-IIA has increased the EP’s ability to interrogate or pass judgement on the Council. Preliminary the answer could be yes. The MEPs in the special committee receive regular oral briefings from the High Representative (HR), during which the MEPs can express their opinions on the Council’s activities and positions. In fact, rather than accessing documents, the most frequent use of the special committee has been for meetings with the HR (EP#11). This practice was commenced under Javier Solana, and has continued under Catherine Ashton and Federica Mogherini. Here, MEPs have the opportunity to ask several rounds of questions, and the arrangement has been described as ‘very interactive’ as the HR engages in answering questions and justifying positions (EP#6). In other words, the special committee is not only informed, but the Council via the HR, also explains and justifies its activities. One could argue that since the special committee gains further insight into for instance details about EU’s operations, it leaves them in a better position to

evaluate and judge the Union’s considerations and conduct, but there is still a lack of consequences should the EP be dissatisfied with the arrangement. The constraints on the EP’s autonomy emanating from the 2002-IIA become even clearer when compared to the IIA from 2014.

The road to the 2014 agreement was a rocky one. Shortly after the entry into force of the Lisbon Treaty, the Commission and the EP agreed on a Framework Agreement where a whole annex dealt with access to information on international agreements, much according to the EP’s preferences (Devuyst, 2014). To the EP, however, it was important to receive information from the Council, such as negotiation mandates, or agendas of Council working group meetings, to be able to stay informed about when and what the Council is debating (EP#12). While the Parliament insisted that the negotiations included all stages of the process—including the mandating period—the Council was adamant that the EP did not have a role to play before the agreement was signed (EP#9). During the negotiations on SWIFT, which was the first international agreement subject to the new rules, access to confidential documents was a key demand of the EP (Meissner, 2016). Only a few weeks before the EP refused its consent to SWIFT, the Council approached it with a draft for a new IIA on access to classified documents. The draft was based on the 2002-IIA, whereby a restricted number of MEPs could gain access to certain documents, on Council premises (Bornemann, Denzel, & Nadbath, 2014). With consent powers to back its claims up, however, the EP did not accept all the Council’s attempts to constrain access and was prepared to use its new powers to push its will through if the Council did not concede to its demands. As a result, the new IIA contained a set of provisions closer to the EP’s position. The EP was particularly pleased having obtained provisions for access to classified information by staff, that security clearance is not necessary for documents below the level of EU confidential, and that “access will be given as appropriate depending on the dossier, to rapporteurs, shadow rapporteurs or all committee members”.<sup>10</sup> Thus, it is clear that the EP was able to set the premises to a much greater extent in the case of the 2014-IIA, compared to the 2002-IIA. In addition, the Lisbon Treaty strengthened the EP’s ability to impose consequences, including in the area of CFSP.

The EP has also twice taken the Council to the CJEU in order to ensure it remains informed about negotiations of CFSP-agreements.<sup>11</sup> In both cases, the EP argued that the Council had concluded agreements on transfer of captured pirates—one with Mauritius and one with Tanzania—without informing the EP. On both cases, the Court ruled in favour of the EP, and annulled the agreements on the grounds that the EP’s right to be informed

<sup>10</sup> Report on the conclusion of an interinstitutional agreement between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, 18 July 2012.

<sup>11</sup> Prior to the 2014-IIA, MEP int’Veld took both the Commission and the Council to Court—under the Regulation 1049/2001 on *public* access to documents—for failure to disclose secret documents on the Anti-Counterfeiting Trade Agreement and the Terrorist Finance Tracking Programme respectively (Abazi, 2015).

had been violated.<sup>12</sup> In its ruling, the Court underlined that the Parliament's right to be informed according to Article 218(10) also applies to the CFSP, and that the rule is "an expression of the democratic principles on which the European Union is founded" (*Parliament v. Council*, 2011, para. 81). The EP and the Council appear to have been interpreting the treaty, these recent judgements, and the 2014-IIA differently. The Council is not prepared to transmit documents automatically (see Hillebrandt, 2017, in this issue), which leads to a problem similar to that of the 2002-IIA, where the EP has to know in advance which documents to request (EP#12, EP#13).<sup>13</sup>

Finally, being able to rely on the advice from staff is crucial to the autonomy of the MEPs. Elected representatives are rarely experts in particular fields, but politicians with general knowledge. They need supporting staff who can provide them with expert information to interpret and decipher highly technical information. Generally, the executive branch has direct access to a more comprehensive apparatus of in-house competence than parliaments. This is even more acute in the EU where the EP is reliant on information from other actors such as the Commission or NGOs, since its staff can be limited (EP#14, see also Dobbels & Neuhold, 2014). When information is classified, this asymmetry is further deepened as is confirmed by one of our interviewees: "when you are not knowledgeable and know the area you are completely lost" (EP#5). The 2002-IIA where access to sensitive information is exclusive to the five MEPs further illustrates this point. Although staff is now allowed into the meetings of the special committee, they are not allowed to access sensitive documents (EP#11). The EP has tried to alleviate this problem by selecting experienced MEPs to sit in the special committee. For example, former French general Phillippe Morillon was for several years a member of the 2002-IIA special committee, and "probably got access to more information than any other MEP would have" (EP#1). In comparison, the 2014-IIA is more accommodating as it allows access to parliament staff along with the committee MEPs, but only those who have been designated in advance as need-to-know, and are security cleared (Article 4(4)). MEPs who do not have such staff available, can get frustrated because they are not allowed to talk to their assistants after having read documents in the secure reading room. This makes their job harder both because the documents are technical and because it is difficult to know what is *not* included in the documents (EP#10, EP#16). The presence of staff, albeit restricted, heightens the likelihood that MEPs understand and know what they are looking at and thus makes them better equipped to do their job as account-holders.

However, one could argue that a potential dilemma remains: Even if some MEPs—be they few or more numerous—are allowed to access classified documents,

this in itself is not enough to guarantee a democratic process. One also has to assess to what extent they reflect the overall composition of the EP as a whole.

#### *4.2. Intra-Institutional Relationship between a Subset of MEPs and the EP as a Whole*

Parliaments are special because their core purpose is to accommodate and voice a wide spectrum of views as authorised through periodic elections. Hence, based on the electoral outcome, their normative authority stems from how successful they are in approximating and institutionalising this representative set of viewpoints—not only when parliamentarians act as a collective in plenary sessions, but also when they convene in smaller groups and committees to conduct parliamentary tasks on behalf of the body as a whole. Hence, the composition of EP-committees and the conditions under which interaction between plenary and committee meetings are organised are crucial in order to maximise the likelihood that all relevant viewpoints are included in the committee discussions (Stie, 2013).

The arrangement in the 2002-IIA allows five MEPs access to sensitive documents through participation in the special committee. There is little open information—in the IIA itself or in the EP's rules of procedure—about how and according to which criteria the Conference of Presidents selects the members of the special committee.<sup>14</sup> Based on the interviews, it seems that the EP's method has shifted slightly. There has for instance been a heated debate about whether or not the chair of the Security and Defence Committee should have a permanent seat, as is the case for the AFET-chair. Furthermore, although the goal has been a composition according to party groups, there are indications of a more pragmatic approach. As mentioned above, experienced MEPs have been preferred in order to maximise the information flow to the EP within the rather narrow limits of the IIA. Even if it can be argued that the inclusion of experienced and knowledgeable MEPs can be an important asset to the special committee, knowledge and experience are always incomplete. It is thus vital to avoid that the selected MEPs' backgrounds are so similar that certain positions get more attention and backing than if they had been confronted with other viewpoints.

Against this background, it therefore seems unlikely that it is possible to reproduce the plurality of views in the EP as a whole during the meetings in the special committee. The problem is not necessarily that the special committee is closed during session. In many cases accountability can be saved by making the information from the meetings known *ex post*, but because secrecy is not temporary, the link between the open EP plenary and committee settings, and the closed sessions of the spe-

<sup>12</sup> C-658/11 and C-263/14.

<sup>13</sup> As part of the new IIA on better law-making, the EP, Council and Commission have committed themselves to negotiate improved practices for information-sharing in the context of the treaty as well as the recent Court-rulings (OJ 2016/L123/01).

<sup>14</sup> One of the authors did obtain the names of the MEPs on the special committee by filing a request for document. So the information is not secret, but hard to obtain.

cial committee, is effectively disconnected. This representativity problem is exacerbated by the *practice* that the 2002-IIA has given rise to, where the HR also gives regular oral briefings to the special committee.<sup>15</sup> If we merely apply an institutional power perspective, one could argue that despite restrictions, the development of this practice has clearly strengthened the Council's obligation to inform the EP about matters concerning security and defence. From a democratic perspective, however, the problem is that the debates between the five MEPs and the HR can be too narrow and fail to "reproduce the pluralism of the public in the private" (Chambers, 2004, p. 390). As the special committee is not composed of a representative selection of elected participants, neither the plenary nor citizens can be sure that all possible positions represented in Parliament as a whole have been voiced and taken into consideration. The risk is that debates are dominated by *private reasons* instead of *public reasons* which means that the arguments presented are not arguments that all could generally accept if they were presented in a publicly open debate (i.e. egoistic and self-interested reasons). In this sense, the arrangement violates the representative nature of the EP. Interviewees underline that the members of the special committee can share some of the information they receive during the oral briefings (EP#11). However, there are no clear guidelines in the 2002-IIA itself, as opposed to the 2014-IIA, where it is explicitly stated that classified information "provided orally...shall be subject to the equivalent level of protection" as written information (Article 6(5)). Furthermore, information up to the level of EU Confidential may be discussed in camera (Article 6(6)). Thus, on the one hand, the members of the special committee get access to much more information than is provided for according to the 2002-IIA. On the other hand, it is not clear just how far they are able to use that information beyond the meetings in that particular committee.

The number of MEPs who are granted access to classified documents under the 2014-IIA—particularly when it comes to documents below the category of Secret and Top Secret—are at least higher than in security and defence policy. Moreover, the latter agreement organises access to classified documents around the relevant permanent committee and/or other specialised bodies where the selection criteria are not only formally regulated and publicly available in the rules of procedure, but also composed according to the numerical strength of the political groups. This increases the likelihood that committee meetings are not merely dominated by particular views, but reflective of the plurality of views in

the Parliament as a whole. In this sense, it can be argued that the 2014-IIA has a stronger internal democratic anchoring than the 2002-IIA. Having said this, it should be noted that 2014-IIA favours some committee MEPs over others, particularly rapporteurs and committee chairs. This inbuilt inequality, which is prevalent in most of EU-legislation, *may* skew discussions and let the positions of the rapporteurs and committee chairs dominate over other relevant viewpoints.

A recent study by van den Putte, de Ville and Orbie (2015, p. 55) shows that not all the members of the International Trade Committee (INTA) agree that they are actually receiving the information they are entitled to: "Liberal MEPs, who generally have a good relationship with DG Trade...argue that they are treated in the same way as the [Council's Trade Policy Committee], while more left-wing MEPs and the Greens believe that the disclosed information is rather vague and selective". Sensitive documents (for example, containing detailed Commission negotiating positions), are only distributed to a limited number of INTA members". The negotiations on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US were a game changer, particularly with regards to transparency.<sup>16</sup> After heavy criticism of the way in which the EU conducted the negotiations with the US, the Commission launched its new transparency strategy in November 2014 where it suggested more extensive access to TTIP documents, a review of the classification of trade information, and to provide broad access to all MEPs (and where necessary staff members).<sup>17</sup> In the end, all MEPs could access documents pertaining to the TTIP negotiations.<sup>18</sup> Even if, according to Meissner (2016, p. 282), "the EP has never been so well informed as in the TTIP negotiations", there is a remaining problem pertaining to what MEPs who gain access can do with that information. Some have argued that the existing restrictions "prohibit governments and MEPs from initiating a detailed analysis of the agreement with their advisors and colleagues, as sharing information with third parties is strictly forbidden".<sup>19</sup> Thus, although the access to information under the 2014-IIA is advantageous compared to the 2002-IIA, the balance between parliamentary and public access is still a problem for processes of democratic accountability.

#### 4.3. Relationship between Accountability Forum and Citizens—Parliamentary Versus Public Access

*Democratic* accountability hinges on the oversight body's ability to connect with and demonstrate to its principals,

<sup>15</sup> This de facto extension of the function of the special committee has also never been publicly debated.

<sup>16</sup> It should be noted, however, that although TTIP is expected to set a precedent for future negotiations, most interviewees underline the particularities of these talks, and so far, there are few concrete changes made to the practices and procedures of other trade negotiations. International agreements beyond trade is another matter, which is why the three main EU actors have started talks on a new IIA on access to documents concerning international agreements.

<sup>17</sup> Press release, Commission, 25 November 2014, retrieved from [http://europa.eu/rapid/press-release\\_IP-14-2131\\_en.htm](http://europa.eu/rapid/press-release_IP-14-2131_en.htm)

<sup>18</sup> Press release, INTA, 2 December 2015, retrieved from <http://www.europarl.europa.eu/news/en/press-room/20151202IPR05759/all-meps-to-have-access-to-all-confidential-ttip-documents>

<sup>19</sup> MEP Heidi Hautala, 10 July 2014, retrieved from <http://ttip2016.eu/blog/ttip%20ecj%20transparency.html>



i.e. the citizens, how it has conducted its role as democratic scrutiniser of executive power. As noted above, democracy can accommodate some secrecy, the question is how the IIAs strike the balance between secrecy and transparency.

In the general legal framework on access to EU documents (Regulation 1049/2001), sensitive documents encompass information that protects “essential interests” or specific areas, “notably public security, defence and military matters”. According to one interviewee, the term “notably” is like saying that “anything goes. It is very open-ended and it could be misused” (EP#4). Other interviewees argued that there is an acceptance within the Parliament that this restrictive model *can* be justified for *security and defence*, but not for other fields (EP#2). MEP Brok, who negotiated the 2002-IIA for the Parliament, argued at the time that it was crucial to guarantee the necessary secrecy of certain documents but that the rules also had to maintain the level of transparency that the public expects from parliament (EP-plenary, 5 September 2000). This illustrates the central dilemma in the discussion about how to balance openness and secrecy: “Democracy requires publicity, but some democratic policies...require secrecy” (Thompson, 1999, p. 182). Hence, all sensitive documents should not be accessible, as some information may seriously undermine the security of the EU and its member states, and even mean that lives are put at risk. Most national parliaments have particular provisions and procedures that protect sensitive information. Thus, restraints in themselves need not be undemocratic, but they have to be qualified.

This point has been meticulously demonstrated in the recent work of Deidre Curtin (2013, 2014). She argues that in the EU there is “virtually no substantive internal control to combat over-classification” (Curtin, 2013, p. 456). This is confirmed by some of our interviewees, who argue that over-classification is becoming a major problem (EP#4). If such a practice is widespread, for whatever reasons, it undermines the terms on which secrecy can be accepted in the first place. In institutionalising secrecy rather than openness as default procedure, the Council runs into a problem of how to justify in whose name or on whose behalf it can legitimate and maintain such a practice.<sup>20</sup> To automatically classify documents without qualifying why this is necessary and reasonable is incompatible with a democratic accountability perspective, because the reasons for secrecy are in themselves in need of scrutiny and justification (Chambers, 2004, p. 389).

The 2002-IIA was negotiated by a small team of MEPs and various presidencies, and when debated in plenary, the terms were already settled. After MEP Brok had presented his report, there was a short discussion where several MEPs expressed their hesitations about the agreement. MEP Martin said: “the way in which this has been negotiated is not exactly exemplary, and the fact is that, in the final analysis, we are faced with a take it or leave

it situation”. Curtin (2014, p. 692) has argued that “[t]he procedure involved in such negotiations means that secrecy is applied to the process itself even when there can be no issue of necessity to negotiate behind closed doors for reasons of security or otherwise”. At the same time, the Conference of Presidents, which consists of the party groups chairs and the EP-president, mandated the negotiations, and its (edited) minutes are publicly available. The Conference of Presidents is also representative in the sense that it gives voice to all party groups in the chamber. Nevertheless, although discussions about the negotiations did not take place in total secrecy, Union citizens were far from exposed to a publicly accessible debate on if and when information can be kept secret. In other words, the democratic problem pertaining to these decision-making processes is that they violate the principle that (at some point) “the decision to keep a decision or policy secret should be made publicly” available (Thompson, 1999, p. 193).

However, one thing is the procedure for reaching agreement on justified secrecy, another challenge is to exercise these rules in concrete policy situations. A former member of the 2002-IIA special committee described its work as a “bad le Carré-novel” where they were given secret documents—following the strict procedures of leaving mobile phones outside, not taking notes—and then ended up receiving documents containing information that had already been made public in the press. This is not something unique to the EU, most parliaments have procedures for privileged access for selected MPs. But the democratic problem that arises is that (s)he is no longer at liberty to discuss the issues in question neither with fellow MEPs nor in public if and when (s)he receives the information in classified form. The 2014-IIA creates a similar tension. The balance between parliamentary and public access to documents and information is a dilemma that preoccupies several of our interviewees from the EP. Those who are more pragmatist argue that the EP’s ability to scrutinise the Council’s external activities has greatly increased. The counter-argument, from an idealist perspective, is that the Council retains the upper hand—at the expense of democracy. One interviewee emphasised that it is valuable to be able to check that information from other sources is correct, but that it can be difficult to discuss the same issues freely afterwards—fearing that one might leak secret information (EP#10).

At the end of the day, it is the EU citizens who will judge. The recent debate on TTIP provides a good illustration of what is at stake. While the transparency initiatives following the TTIP negotiations have made more information accessible to the public at large, criticism against the secluded character of the negotiations continue (see Coremans, 2017; Gheyle & De Ville, 2017; both in this issue). This may be a consequence of the different standards used to assess how much transparency is enough. It can, however, also be taken as a sign that

<sup>20</sup> For a counter argument, see Galloway (2014).

Union citizens do not trust and accept that the European elites conduct entire negotiation processes behind closed doors on trade deals that will greatly impact their daily lives. In other words, there may be situations where the nature of the cases (e.g. if they are particularly contested and/or if they directly affect people's lives) requires more transparency. In such situations one could argue that parliamentary oversight committees should be authorised to make an executive-independent decision to move scrutiny discussions from a secret and over to a publicly accessible setting. As we have seen, neither of the two IIAs provide the EP with such possibilities. Rather, in effectively putting a muzzle on them, it is doubtful whether the EP can represent a strong enough safeguard against unjustified executive secrecy and thus act reliably in its role as democratic accountability forum, even if it might want to.

## 5. Concluding Remarks

However one approaches questions of secrecy, transparency and democratic accountability, it is important to remember that the practice of withholding certain types of documents and information from the public at large, while conveying it to a selected group of parliamentarians, is a well-known practice in countries all over the world. As a result, it makes little sense to use the IIAs and the ensuing practices only to lambast the EU for its democratic deficit. Rather, the implication of this analysis is to point at a problem that runs through foreign policy and external relations on a global scale, to illustrate what the democratic dilemmas are, and why they arise and often also persist.

The main purpose of the two IIAs discussed in this article, is to enhance transparency in the EU's foreign policy by allowing the EP (varying degrees of) access to sensitive information while at the same time accommodating the need for secrecy. It can be argued that the IIAs have reinforced the EP's role in EU foreign affairs, by giving it access to information to which it was previously denied, but this increase in power does not automatically entail a strengthening of the EP as a democratic accountability forum. Both IIAs (even if there are differences between them) fail to maximise the likelihood that the plurality of views in the EP as a whole is reproduced in the meetings of the oversight committee. However, the main reason is that the citizens are largely deprived of possibilities to gauge how their elected representatives exercise their role as guardians of executive power. As a result, the EP risks being conceived more as a "runaway guardian" than as a democratically authorised representative assembly. Short of meeting the democratic standard, it could still be argued that the IIAs contribute to making EU foreign policy less prone to power abuse or badly informed decisions because a more diverse set of actors are familiar with what is going on and can raise questions and objections to avoid the pitfalls of group-think, bounded rationality etc. Thus, the net-worth of the IIAs is therefore that

they have contributed to make EU foreign affairs secrets shallower (cf. Pozen, 2010) and in this sense less incompatible with democratic decision-making. At the same time, the analysis has demonstrated how and why there is a crucial normative difference between being able to advance the parliamentary power base in foreign policy, and becoming empowered to serve the citizens through a democratic accountability forum.

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## Conflict of Interests

The authors declare no conflict of interests.

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